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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. [redacted] 83

GERTRUDE CROMBIE, *Petitioner,*

vs.

HELEN F. CROMBIE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,
First Appellate District

and

BRIEF IN SUPPORT THEREOF

PAUL E. SLOANE,
2 Pine Street,
San Francisco, California 94111,
Attorney for Petitioner.

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In the Supreme Court

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OCTOBER TERM, 1964

No.

GERTRUDE CROMBIE,
Petitioner,

vs.

HELEN F. CROMBIE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, First Appellate District

The Petition of your Petitioner for a Writ of Certiorari to be directed to the Supreme Court of the State of California to review a judgment of that Court, entered January 13, 1965, which denied without opinion a hearing in that Court of the matter theretofore heard and judgment rendered therein on November 20, 1964, in the District Court of Appeal of said State, wherein Petitioner had thereafter petitioned

for a rehearing thereon, also denied, December 18, 1964, without opinion, all of which decisions were in favor of Respondent and against Petitioner, respectfully shows:

I

ISSUES AND GROUNDS

The Supreme Court, which affirmed the decisions of the District Court of Appeal of California, denied to Petitioner (defendant and appellant in the State Courts), a hearing thereon, also denied thereby to Petitioner due process of law, pursuant to established procedures in said State and in the United States, in that it denied to Petitioner a reasonable opportunity for a hearing in the following matters, and under the surrounding circumstances more fully hereinafter set forth.

(1) It disregarded the failure of Respondent (plaintiff in the state courts) to present the most essential evidence to establish her title, to wit, the introduction into evidence at the trial, of the Group Life Insurance Policy on which the present quieting title action was brought in respect to the ownership of the death benefits payable thereunder, or to set forth any of its terms, beneficiaries, execution date and possible connections with prior, cancelled insurance policies and contracts. This lack of evidence was repeatedly called to the attention of these state courts. The failure of said courts to give Petitioner any notice of their intention to disregard such omission, and their subsequent denials of hearings thereon, deprived Petitioner of any hearing thereon, whatsoever, in order

to show the inadequacy of any such evidence *if the same had ever been introduced* to support said judgment and decisions.

(2) Its violation of its own procedural rules (Rule 5), in regard to restricting the record on appeal, and in allowing augmentation thereof (Rule 12), by confirming the ruling of the District Court of Appeal granting Respondent's motion to augment said record on appeal in this respect, over the objection of Petitioner, without said Court giving any legal grounds therefor, either then or thereafter, and thereby including oral testimony therein of a legal opinion of a non-attorney employee of the insurance carrier as to the alleged continuity of two earlier, cancelled policies constituting one, but without connecting them with the policy under which the death benefits involved in this action were paid, and by *the express reliance of these courts upon such oral, incompetent opinion thus allowed by this augmentation in sustaining said judgment.*

(3) Its total disregard of, and silence in respect to, Respondent's failure to present any evidence in respect to the next most essential fact needed to establish her title to the whole of said death benefit, to wit, her failure to introduce any evidence of any *surviving community interest* in her with the insured employee, as her divorced husband, or any power or capacity in said employee to perpetuate any such community interest of theirs in, or to make the Respondent an irrevocable beneficiary under, or to perpetuate, the policy in effect on the dates of their Interloeutory

Decree of Divorce on March 9, 1953, and of their Property Settlement Agreement on February 14, 1953, and following the cancellation of said policy on July 14, 1953, (which matters had been called to said court's attention), whereby Petitioner was denied any opportunity to have a hearing thereon or to answer, or to understand, or to be heard, in respect to the court's justification of its silence or reasoning thereon. These decisions were expressly denied publication by order of said courts.

(4) Its denial of the aforesaid due processes on behalf of Petitioner, without prior notice, warning, or means of expectation, and *to her utter surprise,* and with no opportunity thereafter to have any hearing thereon, also without reference to, or explanation of said denials, although these defective proceedings had theretofore been called by Petitioner to the attention of said courts, both by her Petition for a rehearing by the District Court of Appeal (denied December 18, 1964), and by her Petition for a hearing by the State Supreme Court (denied January 13, 1965), both of which were denied without hearing or explanation, whereby Petitioner was denied any opportunity for a hearing thereon, and was thus deprived of her property in and to said insurance benefits under said policy without due process of law.

II

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Petitioner herein, Gertrude Crombie, (defendant and appellant in the California State Courts) and Respondent herein, Helen F. Crombie, (plaintiff and respondent in the California State Courts), were the sole beneficiaries, entitled to fifty per cent (50%) each of the death benefits on September 22, 1958, under a Group Life Insurance Policy, carried on said date by The Equitable Life Assurance Society of the United States upon the life of Francis J. Crombie, as an employee of Mackay Radio and Telegraph Company, a subsidiary of International Telephone and Telegraph Corporation, the principal insured as "Employer" under said policy, insuring the lives of its employees and the employees of all its subsidiaries. However, neither the policy in effect on the date of death of Francis J. Crombie, the insured employee, on September 22, 1958, nor any of its terms, nor its date of execution, nor proof of its relationship to any prior cancelled policies or contracts, were ever introduced into evidence.

Said insured employee was divorced from Respondent, Helen F. Crombie, by final decree entered on March 26, 1954, in the Superior Court in San Francisco. He thereupon married Petitioner, Gertrude Crombie, on April 13, 1954. He died on September 22, 1958, leaving a death benefit to his said two beneficiaries under said policy then in effect, though never introduced into evidence, in the said sum of $16,800.00, with $8,400.00 to each of said beneficiaries.

The Respondent at once made claim to the full amount of said benefits to wit, $16,800.00, on the grounds hereinafter set forth, in consequence whereof the two parties and their attorneys entered into a letter agreement, dated July 24, 1959, with instructions, and directed to said insurance carrier, The Equitable Life Assurance Society, to pay said sum of $16,800.00 by check made out to the joint order of the two parties hereto as the "sole beneficiaries of subject policy," and their attorneys, and to deliver the same to California-Pacific Title Insurance Company of San Francisco, "as depository for the account of said beneficiaries, . . . and subject to said $16,800.00 being apportioned, divided and paid to said respective beneficiaries," as "a Court of competent jurisdiction by final decree, fixes and adjudicates the rights of the respective beneficiaries."

Respondent filed suit on November 10, 1959 to quiet her title to the entire $16,800.00 in herself, together with accrued savings account interest thereon, since the deposit thereof with said depository. Defendant and Appellant filed Answer and Cross-Complaint to quiet her title to said $8,400.00 with interest thereon due her under said policy. Said complaint alleged that said insured employee had designated "defendant, Gertrude Crombie, as beneficiary of said policy," whereby "defendant claims an undivided one-half (½) interest in the proceeds from said policy" (Cl. Tr. 4:8-11); and that said defendant "was the widow at the time of his death." (Cl. Tr. 3:21-23.) Said complaint also "incorporated" said escrow agreement, dated July 24,

1956, "by reference as if fully set forth herein," which agreement, as above noted, designated the two parties to said action as "sole beneficiaries of subject policy." (Cl. Tr. 8:14, 15.) At the trial, Petitioner (defendant) introduced into evidence a printed statement of the insurance carrier that the said parties were equal beneficiaries under said policy. (Def. Exh. A, hereinafter set forth.)

How then did Respondent justify her claim to the whole of said death benefits? Said complaint set forth the theory upon which Respondent (plaintiff) claimed this entire amount, as being based on an *unproven assumption*, supported by no evidence whatever, that the policy in effect at date of death, on September 22, 1958 (Cl. Tr. 3:22, 23), (which policy had never been introduced into evidence, nor were any of its terms or date of execution, or relation to other policies or contracts, testified to at the trial), was, in fact, the same policy as that earlier Group Life Insurance Policy for successive One Year Terms, automatically renewed unless cancelled, which was dated August 14, 1929, and was expressly cancelled as of July 14, 1953. (Pl. Exh. 7, last 37 pages thereof.) Also, said complaint assumed, without evidence, that the policy in effect at insured's death was the same policy as that certain superceding Group Life Insurance Policy dated July 14, 1953, which was expressly cancelled and rewritten on March 12, 1956. (Pl. Exh. 7, first 23 pages and p. 23 thereof.) No proof of any relationship between these policies was ever introduced at the trial, either oral or written, or of any relation

of these two cancelled policies with the policy in effect on September 22, 1958. The insurance company had, however, given the same number to each, but with no evidence of similarity or continuity of terms with said prior policy, cancelled as of March 12, 1956. Admittedly, by the terms of these two earlier, cancelled policies, which were introduced into evidence, they provided for ever increasing premiums and benefits each year. Said first policy dated, August 14, 1929, had a death benefit when cancelled on July 14, 1953, *if the insured employee had then died,* of only $11,750.00, according to the allegation and admission of Petitioner's Answer and Cross-Complaint. (Cl. Tr. 36:7-23; See also, terms of said two prior cancelled policies—Pl. Exh. 7.)

Respondent, by her complaint, further relies upon a Property Settlement Agreement, dated February 14, 1953, between said insured employee and the Respondent, at which time the latter was the wife of said employee, which agreement was made a part of an Interlocutory Decree of Divorce, entered March 9, 1953, and of the Final Decree between said parties, entered March 26, 1954. (Pl. Exh. 1.) By this agreement said employee undertook to assign to Respondent all his community interest with Respondent in said policy of August 14, 1929, and to make the Respondent, the irrevocable beneficiary under said policy in respect thereto, and keep such policy in full force and effect (which the insurance carrier thereafter advised him, in his endeavor to carry out this undertaking, could not be done under the terms of the policy, Pl.

Exh. 5; see also Pl. Exhs. 2 and 4). Under said earlier, cancelled, unconnected policy, the benefits thereto accrued only as each month's premiums were paid, and no part of any of the employee's contributions, after March 26, 1954, were the community property of these parties. Moreover, said policy never had any cash surrender, loan, or assignable value at any time. Furthermore, after the employee's marriage to Petitioner herein on April 13, 1954, all of such contributions were made entirely from the mutual community earnings of Petitioner and said employee.

Said Supreme Court and District Court ignored all these facts, and omissions of evidence, and made no reference thereto in their said judgment and decisions, though such omissions of evidence were repeatedly called to their attention. Petitioner was thus deprived of any opportunity to have a hearing thereon or to meet said evidence if introduced, or to obtain due process in respect thereto.

III

RECORD OF NO EVIDENCE, NO OPINION THEREON, ABSENCE OF DUE PROCESS AND NO HEARING ALLOWED THEREON.

1. As above indicated, no evidence was introduced of the policy in force at date of death of insured, under which the death benefits were paid into escrow hereunder and upon which the present action to quiet title thereto is based. Moreover, no direct evidence was introduced at the trial, as to who were the bene-

ficiaries under said undisclosed policy, other than the assumptions and admissions of such two beneficiaries indicated in the complaint, quoted above, and in the certificate of the carrier introduced by the Petitioner (Def. Exh. A), as follows:

> "Certificate of Equitable Life Assurance Society of the United States. . . . the records now show the beneficiary duly designated by Francis B. Crombie to be Gertrude Crombie, Helen Crombie. Effective Nov. 9, 1954, (Cert. No.(s) 2124C, subject to the right of the Employee to change the beneficiary in accordance with the provisions of said Group Policy. . . . /s/ Ray D. Murphy, President."

The first amendatory rider of the superceding policy, dated July 23, 1953, though subsequently also cancelled and replaced (Pl. Exh. 7, p. 15, of the first 23 pages), read as follows:

> "The beneficiary with respect to an employee insured under the policy who on July 23, 1953 was insured under Group Policy No. 3088, which this policy replaces shall be the person or persons designated as the beneficiary under said replaced policy until the employee thereafter designates a beneficiary for the insurance hereunder, or changes the beneficiary as set forth in this provision."

The designation of both beneficiaries under the policy in effect on November 9, 1954 (Pl. Exh. 6) was made on said date as indicated in said Defendant's Exhibit A.

2. No decision or opinion was ever rendered in these proceedings that made any reference to or regarding the effect of the absence of the foregoing evidence, nor of any evidence showing any relationship of this undisclosed policy of September 22, 1958 to the prior cancelled policies, nor to the effect of such lack of evidence showing any relationship of this undisclosed policy to the prior cancelled policies.

3. Nor was any evidence introduced, nor any decision or opinion rendered, referring to the connection or application of such policy at death of the insured to the Property Settlement Agreement of February 14, 1953, and the associated divorce decrees, or showing the later existence of any *surviving community interest* of the insured with Respondent, or of any power or duty in the insured over such final policy to make Respondent an irrevocable beneficiary under said undisclosed policy, or to perpetuate any such powers and rights under such earlier policies within the later policies, beyond the then extent of *such community interest* of said parties on February 14, 1953, or beyond the terms and benefits of the *then existing policies.* No decision or opinion was ever expressly rendered on these points. These matters were carefully ignored in all said decisions, as shown by the copies of these decisions hereto annexed. This by-passing of these issues in these decisions constitute a denial of due process.

4. Further denial of due process was occasioned—to the unanticipated surprise and without prior notice to Petitioner—when the District Court of Appeal,

after final argument, ignored the Supreme Court's rules of procedure (Rules 5 and 12), and by its admission thereupon of incompetent, oral, inadmissible evidence of an unqualified witness as to the continuity of the two cancelled policies, and rendered its decision against Petitioner *almost solely* by its reliance upon that inadmissible evidence. This decision was affirmed by the Supreme Court's decision in its denial of any hearing thereon to Petitioner, in respect to this unpredictable and erroneous decision. Yet, the absence of such evidence and any consideration thereof in their decisions, had theretofore been called to the attention of these courts.

The surprise and unpreparedness of Petitioner for these final decisions came too late for any presentation of evidence or argument thereon. They were unpredictable as indicated by the procedure that had led up to them. The court at the pretrial hearing had recommended as follows:

> "It is recommended to the trial court that any issues of law be first determined as the rulings thereon may either restrict the remaining factual issues to be tried or may entirely dispose of them without the necessity of a trial thereon. To that end it is recommended that all documentary evidence to be relied upon by the parties be first admitted and that, the Court thereupon upon proper motion, determine the effect of such documents on the factual issues hereinabove delineated."

The trial court conformed to this procedure, and sought to limit it to the introduction of written docu-

ments, and their authentication. Petitioner at that time did not know that the massive exhibit of insurance policies introduced by Respondent (Pl. Exh. 7) did not include the policy that was in effect on September 22, 1958. It was not until after the appeal had been perfected that this omission was discovered. It was not Respondent's duty to supply it. Petitioner had taken her appeal on the Clerk's Transcripts and Exhibits alone, and the trial court had denied the Respondent the right to augment the record on appeal, in conformity with the Supreme Court's Rule No. 5. After the Opening Brief of Petitioner (appellant) was filed, Respondent moved to have the record on appeal augmented to include the Reporter's Transcript, in order to present said oral testimony of said unqualified witness—a Mr. Hayden. Reluctantly (at least so it appeared to Petitioner) the District Court granted the Respondent's motion of augmentation, over Petitioner's objection, provided Respondent agreed to pay all costs of preparing such additional transcript. There was no indication by the District Court that it intended to give favorable consideration to this unqualified, inadmissible evidence, either at the hearing of this motion, or at the final oral argument when all briefs were in. Nevertheless, the Respondent's brief did place great weight on this evidence in her Reply Brief, stating in part:

> "The master group policy (Pltf's. Ex. 7, RT 25: 20-26) was always the same policy. . . This is proved by Pltf's Ex. 7 (RT 25:20-26) and the testimony of Walter R. Hayden (RT 26:1 to 29: 20), official of the Equitable Life Assurance So-

ciety. His testimony is so emphatic and complete, —that a large part of witness Hayden's testimony is set forth as follows:

'Mr. Hettman: Q. Mr. Hayden, I give you Plaintiff's Exhibit 7, and I want to ask you some questions regarding that. I will ask you first whether the policies, and all exhibits there, refer to one group policy Number 3088?

A. To the best of my knowledge they do . . .

Q. . . . look on the notation on the back, where it has the word "Cancelled." Will you tell us about that?

A. That was the Society's practice of cancelling this policy here, indicating that it's being continued under this new form. . . . the amount of premium would be changed each year. . . . The number of employees and the amount of coverage. . . . different benefits were added—additional benefits were added to it'." (RT 26:19-20; 35:16-26.)

Rule 5 (f) of the Rules of the Supreme Court read as follows:

"Where the appellant has designated only a clerk's transcript consisting of part or all of the matters specified in Rules 5(a) and 5(b) and has not given notice to prepare a reporter's transcript, the respondent may not require the preparation of a reporter's transcript but he may counter-designate any exhibits, affidavits, papers or records, other than instructions, which may properly be included in a clerk's transcript."

Rule 5(a) of said Rules, above referred to, provides:

"Within 10 days after filing the notice of appeal, the appellant shall serve on the respondent and file with the clerk of the superior court a notice

designating the papers or records on file or lodged with the clerk, including the clerk's minutes and any written opinion of the superior court and exhibits either admitted in evidence or rejected which he desires incorporated in the record on appeal."

Petitioner would have had no objection to such augmentation on the appeal under Rule 12(a), if she could have barred the appellate court from giving any consideration or weight to this inadmissible testimony—not so much in respect to the only two policies contained in said Exhibit 7—but also to prevent its unjustifiable application of this testimony to *the policy in effect on September 22, 1958, which was not even in evidence.* This appeared quite inconceivable, yet it is precisely what the two appellate courts did do. (See Opinion attached hereto.)

5. These proceedings involved a denial of due process under the foregoing rules and directives, and the denial of both a rehearing or a hearing thereon which will result in taking of property without due process of law in violation of Amendment XIV, Sec. 1 of the U. S. Constitution, and of Art. I, Sec. 13 of the Constitution of California, unless a Writ of Certiorari is issued hereunder. Such a denial of due process by the Supreme Court of the State of California in its denial of a hearing by said Court on these issues involved a Federal question of substance not heretofore decided by this Court in this proceeding.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed

to the Supreme Court of the State of California commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Supreme Court of the State of California had in the case numbered and entitled on its docket, 1 Civil No. 21,287—Helen F. Crombie, Appellee and Respondent v. Gertrude Crombie, Appellant, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of California in denying a Hearing after Hearing in and affirmance by the District Court of Appeal of California, of the trial court's judgment, be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, San Francisco, California,
April 12, 1965.

PAUL E. SLOANE,
Attorney for Petitioner.

(Appendix Follows)

Appendix

In the District Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 21,287

HELEN F. CROMBIE,
Plaintiff, Cross-Defendant and Respondent,

vs.

GERTRUDE CROMBIE,
Defendant, Cross-Complainant and Appellant.

OPINION
(Not to be Published)

This is an appeal by a second wife from judgment quieting title of plaintiff, the first wife, in the proceeds of a policy of insurance upon the life of the husband, now deceased.

Plaintiff and decedent married in 1925. In 1929, decedent's employer obtained a group life insurance policy for its employees. Decedent elected to become

an insured, designated plaintiff as the beneficiary, and thereafter contributed through payroll deductions to payment of the premiums. The group policy provided for automatic renewal on each anniversary. From time to time the policy was modified, usually to increase benefits. Occasionally, a new policy, including recent modifications was issued. Such a reissue occurred in July, 1953. All policies, however, bore the same number, and an employee of the insurer testified that all certificates, from 1929 on, represented the same basic insurance contract.

Plaintiff and decedent executed a property settlement agreement February 14, 1953. It described the above policy and provided: "Husband further agrees to make and does make Wife the irrevocable beneficiary thereof and to keep and maintain said policy in full force and effect." Because of the terms of the group policy, the insurer did not accept decedent's ensuing attempt to make irrevocable the designation of plaintiff as beneficiary. Interlocutory decree of divorce, entered March 9, 1953, approved and incorporated the agreement, as did final decree entered a year later. In 1954, decedent and defendant were married, and decedent, without notice to plaintiff, designated defendant as beneficiary to the extent of half the policy proceeds. The insured husband died in 1958. Plaintiff brought this action to quiet her title to the policy proceeds of $16,800, and defendant cross-complained for half thereof. By stipulation the insurer paid the money in escrow to await judgment. Plaintiff prevailed and defendant appeals.

By the property settlement agreement, decedent waived his right to remove plaintiff as beneficiary of the policy. That agreement, and the decrees incorporating it, transferred to plaintiff all decedent's rights in the policy. It follows that he had nothing to transfer to defendant by the attempted change of beneficiary in 1954 (Mutual Life Ins. Co. v. Franck, 9 Cal. App. 2d 528, 537-8; Mahony v. Crocker, 58 Cal. App. 2d 196, 202-3).

Defendant, however, argues that this rule can apply only to the policy in effect in February, 1953, that the certificate issued to the employee in July of that year is new, and thus not subject to the agreement. But this view is patently unsound. The evidence shows that the same policy was in effect from 1929. Its benefits were occasionally altered by agreement between employer and insurer, but it bore the same number throughout and was treated by the insurer as being but a continuation of the 1929 policy. To accept defendant's view would be to render wholly illusory decedent's agreement to keep the policy in effect and maintain plaintiff as its beneficiary.

Judgment affirmed. Pursuant to stipulation, cost of reporter's transcript is not awarded as costs.

Draper, P. J.

We concur:

Salsman, J.

Devine, J.

Filed November 20, 1964.

Lawrence R. Elkington, Clerk.

In the District Court of Appeal
State of California
First Appellate District

DIVISION THREE

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1 Civil No. 21,287

HELEN F. CROMBIE,
Plaintiff, Cross-Defendant and Respondent,

vs.

GERTRUDE CROMBIE,
Defendant, Cross-Complainant and Appellant.

BY THE COURT

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated December 18, 1964.

Draper, P. J.

Filed December 18, 1964.
Lawrence R. Elkington, Clerk.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Jan. 13, 1965

Dear Sir:

I have this day filed order "Hearing Denied."

In re: 1 Civil No. 21,287, Crombie v. Crombie.

Respectfully
William I. Sullivan,
Clerk.

Received January 14, 1965.

26908—877 7-64 2500 OSP

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

GROUNDS, STATEMENT OF CASE AND SPECIFICATION OF ERRORS

These areas appear to be amply covered in the foregoing, and overextended Petition. The Statements therein of the Issues and Grounds, the Statement of matters involved, and the Record of errors, would appear to furnish their own answers as fully as if restated here. Both there and here, the present counsel's inexperience in this field of law, in spite of fifty years of law practice, will be too apparent. But he and Respondent may gain some reassurance from the basic principles of Grounds for Certiorari laid down in the following authorities:

Polko v. Connecticut (1937), 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288;

Napue v. Illinois (1959), 360 U.S. 264, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217, 47 Cal.L.R. 238;

Witkin: "Summary of Calif. Law" (1960), Vol. 3, pp. 1903, 1904, 1914-1918.

Also, it appeared to counsel herein that the same conclusions were reached in the one day conference at Harvard University on this subject in commemoration of the second centennial of John Marshall's birth, attended by the present counsel ten years ago; at which several members of the present United States Court participated.

It appears so completely incredible and frustrating, in our land of enlightened justice, that the arguments

and issues presented by a litigant can be so completely ignored when seriously urged, and seemingly upon valid grounds to produce a favorable judgment, and that the rug can be so completely and unexpectedly jerked out from under the litigant at the last moment, too late to give him any opportunity for an adequate hearing thereon, that the present Petitioner and her counsel have felt that a solution must necessarily be found and qualify under this final proceeding—this Petition for a Writ of Certiorari. It is fully realized how rarely such a Writ is ever granted in this court; how rarely such a petition can qualify. How true it is that this proceeding cannot enter into the question of challenging the state court's determination of the law and factual problems involved, is recognized. But, in the present case, the state courts never openly, articulately considered or seemed aware of the problems. They never even mentioned them, or discussed them. Their reasons may have been sound if disclosed. We have no way of knowing. What were those reasons? Aren't we entitled to hear them and be given a chance to meet them?

II

JURISDICTION AND STATUTORY RIGHTS HERE INVOLVED

We appreciate that grounds of jurisdiction must be set forth more explicitly than merely a declaration that they come within the purview of Section 1 of the Fourteenth Amendment of the United States Con-

stitution, or Section 13 of Article I of the California State Constitution. The following grounds set forth in the United States Supreme Court Rule, 19, certainly apply.

1. State District Court of Appeal, as affirmed by the Supreme Court's denial of a hearing thereon, has decided a federal question herein under said United State Fourteenth Constitutional Amendment in regard to taking property without due process of law, in a way in conflict with applicable decisions of both the California State law and of the United States Supreme Court, and "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision."

2. The California Supreme Court in thus affirming said judgment of the State's District Court of Appeals "has decided a federal question of substance not theretofore determined" by the United States Supreme Court, "or has decided it in a way probably not in accord with applicable decisions of" said United States Supreme Court.

3. The rights denied to Petitioner in the proceeding of the State courts herein are "of the very essence of a scheme of orderly liberty," and have been so decided as to violate a "principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." *Polko v. Connecticut,* (supra). *Witkin,* (supra) pp. 1903, 1904.

4. Said judgment as thus affirmed did not give Petitioner "reasonable notice and opportunity for

hearing," in respect to the new, incompetent and inadmissible matters which the court relied upon in said judgment, and improperly admitted into the record on appeal by its order to augment the record on appeal in violation of its Rule 5(f) on Appeals. Although the proceedings of Appellate Courts of California do not constitute Administrative proceedings, it would appear that, where those courts ignore substantial evidence or the lack of it, the same rules would apply to the decisions of such courts. See cases cited and applied in Witkin, in respect to administrative proceedings:

"Summary of Calif. Law" Vol. 3, pp. 1926, 1927.

The State statutes not properly followed in the foregoing respects appear to have been disregarded in some degree under the following code enactments:

Calif. Civil Code, Secs. 588-592, 607, 956, 956(a), 1067-1077.

No effort has here been made to quote from our briefs in the State courts showing the extent to which these matters were called to the attention of State Courts, and yet were totally ignored in their decisions. We need, at this point, merely point to the Second Ground urged in Petitioner's "Grounds For Hearing" by the California Supreme Court (pp. 16, 17), entitled: "Denial of Due Process by Disregard Of Appeal Rule 5," and the incorporation therein by reference of "Ground 6" of Petitioner's "Petition For Rehearing" before the District Court of Appeal (pp. 11-14, and pp. 2-11), entitled "Its Disregard Of Rule

5(f) And Its Reliance Upon Evidence Presented Thereby." It hardly seemed appropriate to recite these grounds herein at length, but rather to preserve them for inclusion in the record hereafter to be prepared and filed herein by Petitioner upon this court's order, in the event this Petition is deemed meritorious.

CONCLUSION

Until this further record shall be desired, the undersigned, in order to give this Petition and Brief more probative value, hereby sets forth the following certification, in a form equivelent to an affidavit sworn to before a Notary Public under California law:

The undersigned, under penalty of perjury, hereby declares and certifies that all said statements herein, and in said Petition made, are known to the undersigned to be true of his own knowledge, and that the same are true and correct.

Dated, San Francisco, California,
April 12, 1965.

Respectfully submitted,
PAUL E. SLOANE,
Attorney for Petitioner.